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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
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10 DAMON HONAKER,) Case No. CV 13-8735-JPR
11 Plaintiff,)
12 vs.) **MEMORANDUM OPINION AND ORDER**
13 CAROLYN W. COLVIN, Acting) **AFFIRMING COMMISSIONER**
14 Commissioner of Social)
15 Security,)
16 Defendant.)
17

18 **I. PROCEEDINGS**

19 Plaintiff seeks review of the Commissioner's final decision
20 denying his application for Social Security Income benefits
21 ("SSI"). The parties consented to the jurisdiction of the
22 undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). This
23 matter is before the Court on the parties' Joint Stipulation,
24 filed July 29, 2014, which the Court has taken under submission
25 without oral argument. For the reasons stated below, the
26 Commissioner's decision is affirmed and judgment is entered in
27 her favor.
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1 **II. BACKGROUND**

2 Plaintiff was born on December 15, 1964. (AR 111.) He
3 attended the police academy and completed an associate's degree.
4 (AR 34-35.) He worked as an order clerk and garage-door hanger.
5 (AR 41.) Plaintiff left work to care for his father until his
6 death, in 2002 or 2003. (AR 26-27.) Plaintiff last worked full
7 time in 2000. (AR 26; but see AR 37-38, 124 (last worked in Dec.
8 1998).)

9 Plaintiff filed an application for SSI on May 18, 2010. (AR
10 11, 111-17.) He alleged that he had been unable to work since
11 July 21, 2007, because of "shoulder & joint dislocation," "severe
12 nerve damage in right shoulder," "severe sternum pain," "broken
13 clavicle," "torn tendon and ligaments in right shoulder,"
14 "bruised lung," "migraine headaches," "panic attacks," "memory
15 loss," and "loss of strength and mobility of right arm." (AR
16 111, 124.) After his application was denied, he requested a
17 hearing before an Administrative Law Judge. (AR 67-69.)

18 A hearing was held on April 4, 2012. (AR 22-46.)
19 Plaintiff, who was represented by counsel, testified, as did a
20 vocational expert. (Id.) In a written decision issued July 13,
21 2012, the ALJ determined that Plaintiff was not disabled. (AR 9-
22 21.) On September 23, 2013, the Appeals Council denied his
23 request for review. (AR 1-3.) This action followed.

24 **III. STANDARD OF REVIEW**

25 Under 42 U.S.C. § 405(g), a district court may review the
26 Commissioner's decision to deny benefits. The ALJ's findings and
27 decision should be upheld if they are free of legal error and
28 supported by substantial evidence based on the record as a whole.

1 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
2 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
3 evidence means such evidence as a reasonable person might accept
4 as adequate to support a conclusion. Richardson, 402 U.S. at
5 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
6 It is more than a scintilla but less than a preponderance.
7 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
8 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
9 substantial evidence supports a finding, the reviewing court
10 "must review the administrative record as a whole, weighing both
11 the evidence that supports and the evidence that detracts from
12 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
13 720 (9th Cir. 1996). "If the evidence can reasonably support
14 either affirming or reversing," the reviewing court "may not
15 substitute its judgment" for that of the Commissioner. Id. at
16 720-21.

17 IV. THE EVALUATION OF DISABILITY

18 People are "disabled" for purposes of receiving Social
19 Security benefits if they are unable to engage in any substantial
20 gainful activity owing to a physical or mental impairment that is
21 expected to result in death or which has lasted, or is expected
22 to last, for a continuous period of at least 12 months. 42
23 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257
24 (9th Cir. 1992).

25 A. The Five-Step Evaluation Process

26 The ALJ follows a five-step sequential evaluation process in
27 assessing whether a claimant is disabled. 20 C.F.R.
28 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.

1 1995) (as amended Apr. 9, 1996). In the first step, the
2 Commissioner must determine whether the claimant is currently
3 engaged in substantial gainful activity; if so, the claimant is
4 not disabled and the claim must be denied. § 416.920(a)(4)(i).
5 If the claimant is not engaged in substantial gainful activity,
6 the second step requires the Commissioner to determine whether
7 the claimant has a "severe" impairment or combination of
8 impairments significantly limiting his ability to do basic work
9 activities; if not, a finding of not disabled is made and the
10 claim must be denied. § 416.920(a)(4)(ii). If the claimant has
11 a "severe" impairment or combination of impairments, the third
12 step requires the Commissioner to determine whether the
13 impairment or combination of impairments meets or equals an
14 impairment in the Listing of Impairments ("Listing") set forth at
15 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is
16 conclusively presumed and benefits are awarded.
17 § 416.920(a)(4)(iii).

18 If the claimant's impairment or combination of impairments
19 does not meet or equal an impairment in the Listing, the fourth
20 step requires the Commissioner to determine whether the claimant
21 has sufficient residual functional capacity ("RFC")¹ to perform
22 his past work; if so, the claimant is not disabled and the claim
23 must be denied. § 416.920(a)(4)(iv). The claimant has the
24 burden of proving he is unable to perform past relevant work.
25 Drouin, 966 F.2d at 1257. If the claimant meets that burden, a
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27 ¹ RFC is what a claimant can do despite existing exertional
28 and nonexertional limitations. § 416.945; Cooper v. Sullivan, 880
F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 prima facie case of disability is established. Id. If that
2 happens or if the claimant has no past relevant work, the
3 Commissioner then bears the burden of establishing the claimant
4 is not disabled because he can perform other substantial gainful
5 work available in the national economy. § 416.920(a)(4)(v).
6 That determination comprises the fifth and final step in the
7 sequential analysis. § 416.920; Lester, 81 F.3d at 828 n.5;
8 Drouin, 966 F.2d at 1257.

9 B. The ALJ's Application of the Five-Step Process

10 At step one, the ALJ found that Plaintiff had not engaged in
11 substantial gainful activity since May 18, 2010, the application
12 date. (AR 13.) At step two, the ALJ concluded that Plaintiff
13 had severe impairments of "status post clavicle resection and
14 severe asthma." (Id.) At step three, the ALJ determined that
15 Plaintiff's impairments did not meet or equal a Listing. (AR 13-
16 14.) At step four, the ALJ found that Plaintiff had the RFC to
17 perform sedentary work² but with additional restrictions. (AR
18 14.) Specifically, the ALJ found that Plaintiff could
19 occasionally stoop, kneel, crouch, or crawl, occasionally reach
20 overhead bilaterally, and frequently but not repetitively reach
21 at shoulder level with his right arm; he also should avoid
22 excessive dust, fumes, and smoke. (Id.) Based on the VE's
23 testimony, the ALJ determined that Plaintiff was able to perform
24 his past relevant work as an order clerk. (AR 16.) Thus, the
25 ALJ found Plaintiff not disabled. (Id.)

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27 ² "Sedentary work involves lifting no more than 10 pounds at
28 a time and occasionally lifting or carrying articles like docket
files, ledgers, and small tools." § 416.967(a).

1 **V. DISCUSSION**

2 Plaintiff argues that the ALJ erred in assessing his
3 credibility. (J. Stip. at 2.) He does not challenge any of the
4 ALJ's other findings or conclusions.

5 The ALJ Did Not Err in Assessing Plaintiff's Credibility

6 Plaintiff contends that the ALJ failed to provide clear and
7 convincing reasons for discrediting his testimony and statements
8 concerning symptoms and limitations attributable to his right
9 upper-extremity impairment and asthma. (J. Stip. at 4.) The ALJ
10 did not err.

11 1. Applicable law

12 An ALJ's assessment of symptom severity and claimant
13 credibility is entitled to "great weight." See Weetman v.
14 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779
15 F.2d 528, 531 (9th Cir. 1986). "[T]he ALJ is not required to
16 believe every allegation of disabling pain, or else disability
17 benefits would be available for the asking, a result plainly
18 contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674
19 F.3d 1104, 1112 (9th Cir. 2012) (internal quotation marks
20 omitted).

21 In evaluating a claimant's subjective symptom testimony, the
22 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
23 at 1035-36. "First, the ALJ must determine whether the claimant
24 has presented objective medical evidence of an underlying
25 impairment [that] could reasonably be expected to produce the
26 pain or other symptoms alleged." Id. at 1036 (internal quotation
27 marks omitted). If such objective medical evidence exists, the
28 ALJ may not reject a claimant's testimony "simply because there

1 is no showing that the impairment can reasonably produce the
2 degree of symptom alleged." Smolen v. Chater, 80 F.3d 1273, 1282
3 (9th Cir. 1996) (emphasis in original).

4 Second, if the claimant meets the first test, the ALJ may
5 discredit the claimant's subjective symptom testimony only if he
6 makes specific findings that support the conclusion. See Berry
7 v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding
8 or affirmative evidence of malingering, the ALJ must provide
9 "clear and convincing" reasons for rejecting the claimant's
10 testimony. Lester, 81 F.3d at 834; Ghanim v. Colvin, 763 F.3d
11 1154, 1163 & n.9 (9th Cir. 2014).

12 In assessing a claimant's credibility, the ALJ may consider
13 (1) ordinary techniques of credibility evaluation, such as the
14 claimant's reputation for lying, prior inconsistent statements,
15 and other testimony by the claimant that appears less than
16 candid; (2) unexplained or inadequately explained failure to seek
17 treatment or to follow a prescribed course of treatment; (3) the
18 claimant's daily activities; (4) the claimant's work record; and
19 (5) testimony from physicians and third parties. Thomas v.
20 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); Smolen, 80 F.3d
21 at 1284. If the ALJ's credibility finding is supported by
22 substantial evidence in the record, the reviewing court "may not
23 engage in second-guessing." Thomas, 278 F.3d at 959.

24 2. Relevant background

25 In either January or July 2007, Plaintiff sustained a right
26 upper-extremity injury when he was hit by a car while riding
27 either a bicycle or motorcycle. (See AR 27 (Plaintiff testifying
28 accident occurred January 21, 2007), 111 (Plaintiff alleging

1 onset date of July 21, 2007), 209 (doctor reporting Plaintiff hit
2 while riding bicycle on Jan. 21, 2007), 325 (provider reporting
3 Plaintiff hit by car while riding bicycle), 485 (nurse
4 practitioner reporting Plaintiff hit by car while riding
5 motorcycle).) The record suggests that he had at least three
6 surgeries on his right shoulder, the most recent in May 2011.
7 (See AR 36 (in Apr. 2012, Plaintiff testifying he had had three
8 surgeries), 209 (in 2010, examining doctor noting two surgeries
9 in 2007), 243 (in 2010, treatment notes indicating 2009 surgery),
10 287 (in 2011, provider noting two previous surgeries), 323 (in
11 2011, treatment notes indicating Plaintiff had undergone fourth
12 surgical repair for right shoulder injured in car accident).)

13 In an August 27, 2010 Adult Function Report, Plaintiff
14 stated that his impairments limited his ability to do
15 "[e]verything physical." (AR 133.) He stated that his sleep was
16 affected by severe pain in his shoulder and neck, side cramps,
17 and back pain. (Id.) He stated that he had difficulty dressing,
18 bathing, caring for his hair, shaving, and using the toilet
19 because of severe pain in his shoulder and side cramps. (Id.)

20 Plaintiff stated that he prepared meals weekly, including
21 sandwiches and frozen dinners, and that food preparation took 10
22 to 20 minutes. (AR 134.) Because of his impairments, he was
23 unable to lift heavy or large items or sit or stand for a long
24 time. (Id.) He was able to do "basic house work" "off and on"
25 for a few hours but needed help lifting or moving objects and
26 with groceries, laundry, and dishes. (Id.) He attributed his
27 limitations with housework and yardwork to breathing problems,
28 severe shoulder pain, and side pain. (AR 135.)

1 Plaintiff stated that he went outside three times a week,
2 could do so alone, generally rode in a car, and could drive.
3 (Id.) He shopped for groceries and clothes two or three times a
4 month for two to three hours. (Id.) He was able to manage
5 money. (Id.)

6 Plaintiff stated that his hobbies and interests included
7 bicycling, fishing, shooting, hiking, sports, computers, TV,
8 reading, going to the gym, darts, and other "physical hobbies."
9 (AR 136.) He said he participated in these activities on
10 weekends and some weekdays and did them "very well." (Id.)
11 Plaintiff stated, however, that because of his impairments, he
12 suffered panic attacks and feared riding his bike; he also
13 indicated that he was unable to fish, shoot, or do sports, but it
14 was unclear whether he meant only when he suffered panic attacks.
15 (Id.)³ He further stated that he suffered headaches when reading
16 and watching TV and pain when using the computer or TV. (Id.)
17 He said his impairments sometimes made him angry and short with
18 people and caused depression. (AR 137.)

19 Plaintiff stated that his impairments affected his ability
20 to lift, squat, bend, stand, reach, walk, sit, remember,
21 concentrate, use his hands, and get along with others. (Id.) He
22 said he could walk only a block or two before needing to rest for
23 a couple hours. (Id.) He could pay attention for only 20 to 30
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26 ³ Plaintiff has not contested the ALJ's finding that Plaintiff
27 still hunted, went shooting, and fished (AR 14) despite his
28 somewhat ambiguous answers on the Function Report. Because
Plaintiff has not challenged that finding and because it is
consistent with Plaintiff's present-tense answers on the August
2010 form (AR 136), the Court accepts it as true.

1 minutes and did not finish what he started. (Id.) He followed
2 written and spoken instructions fairly well and got along "good"
3 with authority figures. (AR 137-38.) He did not handle stress
4 well and suffered headaches, nausea, stomach pain, shortness of
5 breath, and vomiting. (AR 138.) He said he sometimes vomited
6 three or four times a day. (AR 139.) He claimed fears of
7 crossing the street, riding a bike, and cars. (AR 138.)

8 Plaintiff's testimony at the April 4, 2012 hearing was
9 largely consistent with his statements in the Function Report.
10 He testified that the car accident caused not only his shoulder
11 injury but also a punctured lung and more trouble breathing from
12 his asthma. (AR 27-28.) He said he had last been prescribed
13 steroids for asthma treatment in mid-2011. (AR 30.) He
14 testified that he did well on steroids once he had been on them
15 for three months but still had an asthma attack "every once in a
16 while" and suffered side effects of drowsiness and increased
17 appetite. (AR 31.) Plaintiff used a nebulizer about three times
18 a week and still suffered minor asthma attacks three to four
19 times a week. (AR 31-32.) He had last visited the emergency
20 room for a more serious asthma attack in 2011.⁴ (AR 33.)

21 Plaintiff testified that he had problems with his right
22 shoulder and suffered frequent illness and migraines. (Id.) He
23 sometimes suffered nausea with vomiting as many as four times a
24 week and once suffered "constant vomiting" "the whole day." (AR
25 35.) Plaintiff's doctors had not determined the cause of his
26 nausea. (AR 35-36.) Plaintiff took Tramadol and Robaxin twice a

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28 ⁴ The record does not include documentation of Plaintiff's
alleged 2011 emergency-room visit.

1 day and Vicodin "when the pain gets really bad."⁵ (AR 36.)
2 Plaintiff said it was difficult to steer or shift a car with his
3 right arm. (AR 36-37.)

4 3. Analysis

5 The ALJ found Plaintiff's subjective complaints "not fully
6 credible." (AR 14.) Indeed, his alleged symptoms and
7 limitations were "out of proportion to the objective clinical
8 findings and observed functional restrictions" in the record.
9 (AR 15.)

10 With respect to Plaintiff's asthma, although the ALJ found
11 evidence of "a recurrent problem of shortness of breath, which
12 occurs continuously," he noted evidence that Plaintiff's
13 breathing problem had "been gradually improving" since its
14 earliest record documentation, in August 2008. (AR 15; see AR
15 176.) With the exception of the August 2008 visit to the
16 emergency room, at which a doctor sought to admit him and
17 Plaintiff apparently refused because "he only has problem once 1
18 yr" (AR 179),⁶ Plaintiff's treatment records show largely
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20 ⁵ Tramadol is used to relieve moderate to moderately severe
21 pain. See Tramadol, MedlinePlus, [http://www.nlm.nih.gov/](http://www.nlm.nih.gov/medlineplus/druginfo/meds/a695011.html)
22 [medlineplus/druginfo/meds/a695011.html](http://www.nlm.nih.gov/medlineplus/druginfo/meds/a695011.html) (last updated Oct. 15,
23 2013). Robaxin is a brand name for methocarbamol, a muscle
24 relaxant. See Methocarbamol, MedlinePlus, [http://www.nlm.nih.gov/](http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682579.html)
25 [medlineplus/druginfo/meds/a682579.html](http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682579.html) (last updated Oct. 1, 2010).
26 Vicodin is the brand name for a combination of acetaminophen and
the opioid analgesic hydrocodone, used to relieve moderate to
severe pain. See Hydrocodone Combination Products, MedlinePlus,
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a601006.html> (last
updated Oct. 15, 2014).

27 ⁶ When asked at the hearing about refusing admission against
28 the doctor's advice, Plaintiff said he didn't remember that. (AR
29.)

1 conservative treatment involving regularly scheduled checkups and
2 medication (AR 15 (ALJ noting conservative treatment); see AR 346
3 (in Jan. 2011, addressing complaints of persistent shortness of
4 breath by continuing Plaintiff's prescriptions and adding "short
5 steroid course to clear up airways"), 334 (in May 2011, noting
6 that seasonal and pet allergies triggered asthma and that
7 Plaintiff had improved with steroids and advising followup visit
8 in one month),⁷ 332 (in June 2011, noting improvement with course
9 of steroids, continuing asthma medications, permitting steroid
10 prescription in case of worsened symptoms, and advising return
11 visit in four to five months), 323 (in Oct. 2011, adjusting
12 asthma medication and advising followup visit in five to six
13 months), 384 (in Nov. 2011, continuing asthma medications), 383
14 (in Feb. 2012, adjusting asthma medications), 494 (in Apr. 2012,
15 noting Plaintiff's complaints of heightened asthma symptoms,
16 prescribing steroids, continuing other asthma medications,
17 recommending return visit in three to four months), 495 (in Apr.
18 2012, reporting pulmonary-testing results showing "marked
19 improvement" following use of albuterol bronchodilator)).

20 Thus, although Plaintiff's medical records reflect his
21 consistent reports of asthma symptoms and his providers' regular
22 attention to his breathing issues, other than the August 2008
23 visit, his treatment notes do not reflect urgent medical needs.
24 Moreover, as the ALJ noted, even at the August 2008 visit,

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27 ⁷ Plaintiff stated that he did not care for any pets (AR 133)
28 but a few months later reported to his doctor that he had a dog and
two cats, an allergy to which was determined to trigger asthma
symptoms (AR 334).

1 Plaintiff's chest x-rays showed clear lungs, a normal cardiac
2 silhouette, and no sign of acute intrathoracic disease. (AR 15;
3 see AR 180.) April 2012 pulmonary-function testing showed
4 "marked improvement" in Plaintiff's lung function following use
5 of an albuterol bronchodilator. (AR 495.)

6 That Plaintiff's medical records reflect largely
7 conservative treatment of his asthma and no urgent visits since
8 August 2008 was a reasonable basis upon which to discount his
9 allegations of disabling asthma. See Parra, 481 F.3d at 751
10 (noting that "evidence of 'conservative treatment' is sufficient
11 to discount a claimant's testimony regarding severity of an
12 impairment"); Tommasetti v. Astrue, 533 F.3d 1035, 1040 (9th Cir.
13 2008) (response to conservative treatment undermines allegations
14 of disabling impairment); Warre v. Comm'r of Soc. Sec. Admin.,
15 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments that can be
16 controlled effectively with medication are not disabling for the
17 purpose of determining eligibility for SSI benefits.").

18 Similarly, that objective diagnostic testing showed no acute
19 intrathoracic disease and good response to medication was a clear
20 and convincing reason to discount Plaintiff's allegations to the
21 contrary. (See AR 31-32 (Plaintiff testifying he had to use
22 albuterol repeatedly to achieve results)); see Khanishian v.
23 Astrue, 238 F. App'x 250, 252 (9th Cir. 2007) (holding that ALJ
24 properly found claimant's credibility diminished by lack of
25 objective medical evidence of disability, even when ALJ found
26 medically determinable impairment); cf. Herrera v. Astrue, No. CV
27 10-8994-JEM, 2011 WL 4502017, at *4 (C.D. Cal. Sept. 29, 2011)
28 (upholding ALJ's credibility determination based in part on

1 inconsistency between claimant's allegations and objective
2 medical testing).

3 Plaintiff contends specifically that the ALJ improperly
4 discredited his testimony concerning his chronic asthma. (J.
5 Stip. at 9.) But Plaintiff's testimony did not establish a
6 disabling breathing impairment. Rather, Plaintiff testified that
7 he managed his asthma with a nebulizer and had not required
8 steroid treatment since mid-2011. (AR 30.) He also testified
9 that although he still suffered minor attacks of shortness of
10 breath, he had not had an attack requiring emergency treatment
11 since sometime in 2011 (AR 33), and there is no documentation of
12 the alleged 2011 incident in the record. (See also AR 179 (in
13 Aug. 2008, Plaintiff reporting he had major asthma problems only
14 once a year and had nebulizers at home, "which usually help").)
15 Because Plaintiff's testimony did not establish a disabling
16 asthma impairment but rather suggested that his breathing
17 problems were well managed with prescription medication, the ALJ
18 did not err in discounting Plaintiff's allegations of disabling
19 asthma. Cf. Phetchumporn v. Astrue, No. 1:08-cv-01474-SMS, 2010
20 WL 716156, at *10 (E.D. Cal. Feb. 26, 2010) (upholding
21 credibility determination based in part on claimant's testimony
22 that symptoms were controlled by medication); Aguirre v. Astrue,
23 No. CV-09-2575-PHX-LOA, 2010 WL 4811787, at *14 (D. Ariz. Nov.
24 19, 2010) (same).

25 The ALJ found that Plaintiff's allegations of a disabling
26 right-shoulder impairment were unsupported by the medical
27 evidence and inconsistent with his reported activities. (AR 15-
28 16.) The ALJ noted that Plaintiff had suffered right-shoulder

1 acromioclavicular-joint separation and undergone multiple
2 surgeries following his 2007 accident, most recently in May 2011
3 to address acromioclavicular and coracoclavicular instability.⁸
4 (AR 15; see AR 485.) The ALJ found, however, that aside from the
5 May 2011 surgery, Plaintiff's records reflected "merely
6 conservative and follow up treatment." (AR 15.)

7 In particular, Plaintiff's May 2011 shoulder surgery appears
8 to have been successful. (See AR 345 (no apparent issues upon
9 discharge from surgery), 324-28 (Oct. 2011 plan for postsurgical
10 occupational therapy to strengthen right rotator cuff and
11 increase right-shoulder stability).) And although Plaintiff
12 continued to complain of pain following surgery, he generally
13 reported that his pain had been reduced by the procedure, and his
14 doctors accordingly prescribed conservative treatment, including
15 over-the-counter pain medication and continued activities as
16 tolerated. (See AR 333 (in May 2011, two weeks after surgery,
17 Plaintiff reporting only "mild pain"), 331 (in June 2011,
18 Plaintiff reporting "pain improved from preop" but "some
19 soreness"), 330 (in July 2011, noting Plaintiff "doing better
20 than pre-op" but with "occasional" pain with shoulder movement
21 and recommending Motrin or Tylenol), 329 (in Sept. 2011, noting
22 Plaintiff's complaints of "sharp" right-shoulder pain with range
23 of motion and referring him for occupational therapy), 497 (in
24

25 ⁸ The clavicle (collarbone) and scapula (shoulder blade) are
26 connected by the acromioclavicular joint, which is held together
27 primarily by the acromioclavicular and the coracoclavicular
28 ligaments. See [Shoulder Separation](https://myhealth.alberta.ca/health/Pages/conditions.aspx?hwid=tw9147spec), MyHealth.Alberta.ca,
<https://myhealth.alberta.ca/health/Pages/conditions.aspx?hwid=tw9147spec> (last updated Oct. 29, 2013).

1 Feb. 2012, Plaintiff reporting "pain better overall than pre-op"
2 but "still pain & popping" and being advised to continue
3 activities as tolerated), 499 (in May 2012, Plaintiff "doing
4 fairly well" except for "popping" three to four times daily,
5 "usually associated w/ overhead activities"); but see AR 387 (in
6 Aug. 2011, Plaintiff reporting "constant" right-shoulder pain,
7 noting application for disability).) That Plaintiff appears to
8 have received only conservative care for his right shoulder
9 between his May 2011 surgery and the hearing was a clear and
10 convincing basis upon which to discount his complaints of
11 disabling shoulder pain. See Parra, 481 F.3d at 751; cf. Ortez
12 v. Comm'r of Soc. Sec., No. CIV S-10-2096-CMK, 2012 WL 3727136,
13 at *6 (E.D. Cal. Aug. 24, 2012) (affirming ALJ's credibility
14 determination based in part on "conservative treatment following
15 surgery"); Ramirez v. Astrue, No. CV 10-04188 RZ, 2011 WL
16 1113973, at *2 (C.D. Cal. Mar. 25, 2011) (upholding ALJ's finding
17 that "residual pain following [back] surgery was treated
18 conservatively and did not prevent Plaintiff from performing
19 [sedentary] work").

20 Nor did Plaintiff provide evidence that he had a disabling
21 right-upper-extremity impairment before his May 2011 surgery. As
22 the ALJ noted (AR 15), although Plaintiff alleged an onset date
23 of July 21, 2007, with one exception (AR 199-200), the medical
24 evidence of shoulder impairment dates from late 2009 and does not
25 include notes from his pre-2011 upper-right-extremity surgeries.
26 Medical records predating Plaintiff's May 2011 surgery show that
27 he complained of right-shoulder pain but that neither Plaintiff
28 nor his medical providers treated his shoulder impairment as

1 urgent. Rather, he was seen primarily for regularly scheduled
2 appointments, and his pain was treated with medication; he was
3 referred for orthopedic evaluation when an MRI showed "small
4 tears" in his rotator cuff. (See AR 199-200 (in Nov. 2008,
5 noting complaints of sharp pain, "unremarkable" shoulder x-rays,
6 and "good" range of motion; recommending orthopedic consultation,
7 injections, physical therapy, home range-of-motion exercises;
8 "reassur[ing]" Plaintiff that he can "be as active as he needs to
9 be"), 253-54 (in Jan. 2010, noting Dec. 2009 MRI showing tears
10 and referring Plaintiff to orthopedic specialist), 247 (in Apr.
11 2010, recommending naproxen for pain), 245 (in Apr. 2010,
12 discontinuing naproxen because of gastritis), 242-43 (in May
13 2010, starting Tramadol and recommending return visit in three
14 months), 284-88, 290 (on visits to orthopedic surgeon between
15 Jan. and Apr. 2011, securing previous records and additional
16 imaging to diagnose right-shoulder issue, ultimately proceeding
17 with surgery); see also AR 210-11 (examining doctor noting
18 "normal alignment and contour" and limited range of motion and
19 recommending light work with additional right-upper-extremity
20 limitations).) Thus, although the surgery itself was not
21 conservative, that neither Plaintiff nor his medical providers
22 addressed his shoulder impairment with urgency, even in the
23 period before his May 2011 surgery, was a clear and convincing
24 basis to discount his allegations of a disabling shoulder
25 impairment during that period. See Parra, 481 F.3d at 751;

1 Tommasetti, 533 F.3d at 1040.⁹

2 Further, only one of the providers who treated or examined
3 Plaintiff opined that he was disabled by his shoulder impairment,
4 and that statement immediately predated his May 2011 surgery.
5 (See AR 284 (in Apr. 2011, treatment notes indicating Plaintiff
6 scheduled for surgery and describing him as "very debilitated,
7 unable to work").) By contrast, in September 2010, Dr. Edward K.
8 Nomoto, a board-eligible orthopedic surgeon, found that Plaintiff
9 was capable of light work except that he had additional right-arm
10 limitations of lifting and carrying only five pounds occasionally
11 and three pounds frequently and no overhead reaching. (AR 212.)
12 And only immediately following surgery did Plaintiff's medical
13 providers counsel him to limit his upper-right-extremity
14 movement. (See AR 333 (at first postsurgical visit, in May 2011,
15 noting Plaintiff in sling and not permitted weight-bearing
16 activity with right-upper extremity or range-of-motion
17 activities), 330 (in June 2011, noting Plaintiff "in sling, no
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19 ⁹ The ALJ further noted that despite Plaintiff's claims of
20 significant right-shoulder limitations and inactivity, the record
21 contained "no evidence of severe-disuse muscle atrophy." (AR 15.)
22 The record supports the ALJ's observation of no severe muscle
23 atrophy. (See AR 201-02 (Dec. 2009 report of imaging showing
24 "relatively well developed and symmetric muscular and overall
25 intact tendons"), 210-11 (examining orthopedic surgeon noting
26 "normal alignment and contour" of Plaintiff's shoulders), 287
27 (provider noting only "slightly [decreased] strength" in right
28 upper extremity), 290 (same).) This finding, however, was not
particularly meaningful because Plaintiff did not claim to be
unable to perform any activity at all. Compare Meanel v. Apfel,
172 F.3d 1111, 1114 (9th Cir. 1999) (as amended) (ALJ permissibly
discounted claimant's complaint that her pain required her to "lie
in a fetal position all day" because she "did not exhibit muscular
atrophy or any other physical signs of an inactive, totally
incapacitated individual").

1 ROM" one month after surgery); but see AR 330 (in July 2011,
2 advising Plaintiff to avoid weight-bearing activities for one
3 more month but to discontinue sling use), 329 (in Sept. 2011,
4 referring Plaintiff for occupational therapy upon complaints of
5 "sharp" right-shoulder pain with range of motion), 324-28 (Oct.
6 2011 occupational therapy plan), 497 (in Feb. 2012, Plaintiff
7 reporting "pain better overall than pre-op" but "still pain &
8 popping" and advised to continue activities as tolerated), 199-
9 200 (in Nov. 2008, encouraging physical therapy and home range-
10 of-motion exercises and "reassur[ing]" Plaintiff that he can "be
11 as active as he needs to be"). Although one medical provider
12 prepared a letter summarizing Plaintiff's impairments, she did
13 not indicate any resultant functional limitations. (See AR 485
14 (Sept. 2011 letter from nurse practitioner noting Plaintiff's
15 "history of a right shoulder AC joint separation," "multiple
16 surgeries performed on his right shoulder," hypertension, and
17 asthma and his complaints of pain and limited range of motion).)

18 It is true, as Plaintiff notes, that an ALJ may not
19 disregard a claimant's subjective symptom testimony solely
20 because it is not substantiated affirmatively by objective
21 medical evidence. (See J. Stip. at 5-8 (citing Bunnell v.
22 Sullivan, 947 F.2d 341, 346-47 (9th Cir. 1991))); Robbins, 466
23 F.3d at 883. The ALJ may, however, use consistency with the
24 medical evidence in the record as one factor in the evaluation.
25 See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005)
26 ("Although lack of medical evidence cannot form the sole basis
27 for discounting pain testimony, it is a factor that the ALJ can
28 consider in his credibility analysis."); Carmickle v. Comm'r Soc.

1 Sec. Admin., 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction
2 with the medical record is a sufficient basis for rejecting the
3 claimant's subjective testimony."); Lingenfelter, 504 F.3d at
4 1040 (in determining credibility, ALJ may consider "whether the
5 alleged symptoms are consistent with the medical evidence").
6 Here, the ALJ properly noted the inconsistencies between
7 Plaintiff's medical records and his allegations of disabling
8 asthma and right-upper-extremity impairment in assessing his
9 credibility.

10 The ALJ also found that Plaintiff's daily activities were
11 "not limited to the extent one would expect, given the complaints
12 of disabling limitations and symptoms." (AR 14.) The ALJ noted
13 that Plaintiff could prepare his own meals, perform basic
14 housework, shop for groceries and clothes, manage his money, and
15 engage in bicycling, fishing, shooting, hiking, watching TV,
16 reading, and physical hobbies on weekends and some weekdays. (AR
17 14; see AR 136.) That Plaintiff continued to engage regularly in
18 a broad range of activities, including some that were physically
19 demanding, was a clear and convincing basis for discounting his
20 claims of disabling impairments. See Tommasetti, 533 F.3d at
21 1039 (noting that ALJ may consider claimant's daily activities in
22 assessing his credibility); Mitchell v. Colvin, 584 F. App'x 309,
23 311 (9th Cir. 2014) (upholding finding that claimant's
24 allegations of disabling impairments were inconsistent with
25 reported daily activities, including caring for children,
26 driving, shopping, and riding bicycle); see also Molina, 674 F.3d
27 at 1113 ("Even where those activities suggest some difficulty
28 functioning, they may be grounds for discrediting the claimant's

1 testimony to the extent that they contradict claims of a totally
2 debilitating impairment.").

3 Indeed, although Plaintiff stated that he sometimes feared
4 cycling, his statements suggested that he continued to do it
5 regularly and well, which undermined his claim that his shoulder
6 impairment made it difficult to drive a car. (See AR 135-36.)
7 Plaintiff's regular cycling, fishing, hunting, and hiking also
8 belied his claims that he could not sit or stand for very long or
9 walk for more than two blocks without a lengthy rest. (See AR
10 135, 137.) Moreover, it is unclear how Plaintiff's shoulder
11 impairment and apparently well-managed asthma would interfere
12 with his ability to stand or walk, let alone sit. Although in
13 January 2011 Plaintiff complained of exacerbated asthma symptoms,
14 including "episodes of [shortness of breath] while walking" (AR
15 346), his treatment notes do not reflect consistent complaints of
16 shortness of breath while walking, he testified at the hearing
17 that he had had no asthma attacks requiring urgent care since the
18 previous year (AR 33), and as discussed above, even in instances
19 in which Plaintiff's asthma was exacerbated, his treatment notes
20 did not reflect that it was treated with urgency or that he was
21 advised to avoid exercise.

22 Thus, the ALJ's finding that Plaintiff's daily activities
23 belied his allegations of disabling impairments must be upheld
24 because it is supported by substantial evidence. See Burch, 400
25 F.3d at 680-81 (noting that even when evidence of claimant's
26 daily activities "may also admit of an interpretation more
27 favorable to [claimant]," reviewing court "must uphold the ALJ's
28 decision where the evidence is susceptible to more than one

1 rational interpretation'" (quoting Magallanes v. Bowen, 881 F.2d
2 747, 750 (9th Cir. 1989)); Thomas, 278 F.3d at 959.

3 Plaintiff contends that the ALJ did not specify which of
4 Plaintiff's statements he found not credible. (J. Stip. at 4-5);
5 see Lester, 81 F.3d at 834 (noting that "ALJ must identify what
6 testimony is not credible and what evidence undermines the
7 claimant's complaints"); Treichler v. Comm'r of Soc. Sec. Admin.,
8 __ F.3d __, 2014 WL 7332774, at *9 (9th Cir. Dec. 24, 2014)
9 (finding that ALJ erred when "he made only the single general
10 statement that 'the claimant's statements concerning the
11 intensity, persistence and limiting effects of these symptoms are
12 not credible to the extent they are inconsistent with the above
13 residual functional capacity assessment'"); Martinez v. Colvin,
14 585 F. App'x 612, 613 (9th Cir. 2014) (reversing when ALJ
15 rejected claimant's testimony "without making any credibility
16 determination" and thus failed to "cit[e] what testimony was
17 credible and what testimony undermined [his] complaints");
18 Burrell v. Colvin, __ F.3d __, 2014 WL 7398892, at *3 (9th Cir.
19 Dec. 31, 2014) (ALJ erred in citing claimant's daily activities
20 as basis for rejecting her allegations without "elaborat[ing] on
21 which daily activities conflicted with which part of Claimant's
22 testimony"). Unlike in Treichler, Martinez, and Burrell, the ALJ
23 pointed to evidence of conservative treatment of Plaintiff's
24 impairments (AR 15), noted the improvement of his asthma over the
25 course of time (id.), outlined the relevant medical evidence
26 undermining his claims (id.), and identified specific activities
27 that were inconsistent with his allegations of disabling
28 impairments (AR 14). The inconsistencies between Plaintiff's

1 allegations, on the one hand, and his daily activities,
 2 conservative treatment, and objective evidence of record, on the
 3 other, were proper and sufficiently specific bases for
 4 discounting his claims of disabling symptoms, and the ALJ's
 5 reasoning was clear and convincing. See Tommasetti, 533 F.3d at
 6 1039-40; Houghton v. Comm'r Soc. Sec. Admin., 493 F. App'x 843,
 7 845 (9th Cir. 2012). Because the ALJ's findings were supported
 8 by substantial evidence, this Court may not engage in
 9 second-guessing. See Thomas, 278 F.3d at 959.

10 Remand is not warranted.

11 VI. CONCLUSION

12 Consistent with the foregoing, and pursuant to sentence four
 13 of 42 U.S.C. § 405(g),¹⁰ IT IS ORDERED that judgment be entered
 14 AFFIRMING the decision of the Commissioner and dismissing this
 15 action with prejudice. IT IS FURTHER ORDERED that the Clerk
 16 serve copies of this Order and the Judgment on counsel for both
 17 parties.

18
 19 DATED: January 21, 2015


 20 JEAN ROSENBLUTH
 21 U.S. Magistrate Judge
 22
 23
 24
 25

26 ¹⁰ This sentence provides: "The [district] court shall have
 27 power to enter, upon the pleadings and transcript of the record, a
 28 judgment affirming, modifying, or reversing the decision of the
 Commissioner of Social Security, with or without remanding the
 cause for a rehearing."